

THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(Civil)

SLUHCV2019/0152

BETWEEN:

LINCOLN WEEKES

Claimant

and

MORNE TRULAH LIMITED
MICHAEL MILLS
BRAD LIEBMANN

Defendants

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mr. Thaddeus Antoine of Counsel for the Claimant

Mr. Duane Jean Baptiste with Ms. Michelle d'Auvergne of Counsel for the
Defendant

2021: April 22;
May 4, 11; (written submissions)
June 22.

JUDGMENT

- [1] **CENAC-PHULGENCE J:** The claimant, Mr. Lincoln Weekes, ("Mr. Weekes") owner of property situate at Trouya, Gros Islet ("the Property") filed a claim against the defendants, Mr. Michael Mills ("Mr. Mills") and Mr. Brad Liebmann ("Mr. Liebmann") who are their neighbours for possession of the Property, damages for trespass at the rate of \$1,500.00 from the date of trespass until possession is delivered to him, interest and costs. In the statement of claim, Mr. Weekes claims in addition removal of the illegally erected fence and its foundation and that the land be restored to its original condition before trespass. The parties attempted to resolve their matter amicably and were unable to do so. It is noted that although Morne Trulah is named as a defendant, the claim was stated to be against Mr. Mills and Mr. Leibmann only.

The Pleaded Case

- [2] Mr. Weekes pleaded case is that the defendants without his consent entered the Property and took part possession of it. By letter dated 8th January 2019 (“the 2019 letter”), after many verbal requests, Mr. Weekes formally demanded that the defendants vacate the Property and cease any further construction of a concrete and stone (wall) fence on the Property. Despite this letter, the defendants have refused to give up possession of the Property.
- [3] Mr. Weekes’ allegation is that he repeatedly pointed out the boundary pegs to the defendants but in bad faith they erected a massive wall fence encroaching and trespassing on about 27.5 feet of the Property and that this amounted to a clear and deliberate trespass by the defendants which is continuing. He claims the fair leasing value of the Property as \$1,500.00 per month as damages for the trespass.

The Defence

- [4] The defendants deny the allegations that they entered Mr. Weekes’ property without consent and took possession of it. In response, the defendants say that Mr. Weekes on or about 31st May 2013 granted them permission to construct security barriers along portions of the Property. That permission was preceded by several discussions as to the nature and type of security barriers which were to be erected. Construction commenced in June 2013 in reliance and in accordance with the permission granted by Mr. Weekes. Mr. Weekes was at all times aware of the construction taking place on the Property and he observed and encouraged the construction until he first expressed dissatisfaction in or about December 2015.
- [5] The defendants admit receiving the 2019 letter and aver that it was not until 2015 that Mr. Weekes stopped facilitating further construction by refusing access to the Property. They deny that they were shown boundary pegs as alleged by Mr. Weekes or that they encroached or trespassed as Mr. Weekes alleged. The defendants further aver that Mr. Weekes is estopped from relying on his strict legal rights and he is not entitled to the relief claimed.

[6] Mr. Weekes did not file a reply to the defence.

Issues

- [7] In the claimant's pre-trial memorandum, the issues identified were as follows:
- (a) Whether or not the defendants are in possession of Mr. Weekes property?
 - (b) Was it with Mr. Weekes' consent?
 - (c) Did the defendants abide by the original permission given to erect a fence along the boundary?
 - (d) If not, are the defendants in breach and trespassing?
 - (e) Have they made any effort to vacate the property having been given permission by the claimant?
 - (f) Have the defendants failed to restore the claimant's property to its original state?
 - (g) What damages are to be paid to the claimant?

- [8] The defendants for their part have identified the issues as:
- (a) Whether the defendants trespassed on the claimant's property?
 - (b) If the defendants did not trespass, whether the claimant is estopped from insisting that the defendant remove portions of the wall located on the claimant's property without compensation?

- [9] The Court identifies the following as the issues for determination based on the pleaded case:
- (a) Whether the defendants trespassed onto the claimant's property?
 - (b) If yes, whether the claimant is estopped from asserting his legal rights to ask for removal of the wall?
 - (c) What is the measure of damages due to the claimant, if any?

Discussion

Issue (a)-Whether the defendants trespassed on Mr. Weekes' property?

- [10] Mr. Weekes' evidence is that in May 2013 he received a note from Mr. Mills seeking permission to put up a fence on his property. Attached to that note was a picture of what was being proposed (exhibit LW1) and it highlighted areas of

concern and addressed them. Mr. Weekes then quotes a few selected sections of that note. LW1 is a picture of a fence like structure.

- [11] The full text of the note as Mr. Weekes calls it was not exhibited to his witness statement. That note turned out to be the disclosed email trail of 31st May 2013 (with some pictures of the proposed fence attached) which both the claimant and defendant disclosed in their list of documents. The full text of that email will be discussed later.
- [12] On his return in about September 2013, Mr. Weekes says he noticed major works taking place on his property. He called Mr. Mills and Mr. Leibmann to express his displeasure and requested that they immediately stop and remove the works and remove the wall and Mr. Mills promised to stop and remove the wall. It is not clear the timing of this encounter. The wall he says measured 27 feet high with 5 feet of metal fence. He exhibited what he says is a photograph of the wall as LW2. That photograph was not disclosed by Mr. Weekes before the filing of his witness statement.
- [13] Although the works did stop, the unfinished wall remains on the Property and his continued requests for its removal were ignored.
- [14] Mrs. Esther Browne-Weekes is Mr. Weekes' wife. Her evidence is that what they originally agreed to was that the fence would be erected along the joint properties and would be of non-permanent material like wire. She refers to diagrams being presented by the defendants outlining the structure and explaining the type of material to be used, so that there would be no misunderstanding. However, she does not exhibit those.
- [15] Her evidence supports Mr. Weekes' evidence in the main that unknown to them and without approval, a massive wall was constructed along some part of the property which was first noticed after they returned from travelling. In her evidence she says that Mr. Weekes had expressed to Mr. Mills and Mr. Liebmann that the wall was inappropriate and not what was agreed to and that he had requested that the construction be discontinued, and the part of the wall

already constructed be removed immediately. Mr. Weekes in his evidence never says that he told the defendants that the wall was not what was agreed to.

[16] Like Mr. Weekes, Mrs. Weekes says the wall is in an incomplete state affecting the value of the Property. She says despite several emails between Mr. Mills and Mr. Weekes dating back to 2015 regarding removal of the wall, the defendants have deliberately ignored the request to demolish the part of the wall already constructed on the Property. It is noted that no emails were exhibited to Mrs. Weekes' witness statement.

[17] Mr. Mills' evidence is that they have enjoyed a very good relationship with Mr. Weekes and his wife as neighbours most of the time since they moved into their house. He says after many discussions with Mr. Weekes, it was agreed that it would be beneficial if a security **barrier** were erected and he exhibits a copy of the email of 31st May 2013 from him to Mr. Weekes. He says that the topography and location of the shared boundaries required that the barrier be on part of Mr. Weekes' property. In or about May 2013, Mr. Weekes gave written and verbal permission to use certain portions of his property for the purpose of constructing the barriers at their sole expense.

[18] Mr. Mills goes on to say that he and Mr. Weekes met on several occasions at the location of the boundary pegs in order to initially scope out and later to affirm the trajectory and extents of the barrier, the location of the gates and staircases and finally to discuss the extent of the metal wire mesh placed thereupon. It was also agreed that the barrier would comprise of stone and concrete foundations, fences and gates at two locations.

[19] Mr. Mills sets out at paragraph 8 and 9 of his witness statement details of the barrier which was to be constructed. Construction of the barrier according to Mr. Mills began on 1st June 2013 and the concrete foundations were completed on 13th October 2013. Installation of the metal security mesh on the barrier was completed on 29th April 2015. Mr. Mills says all these works were done with Mr. Weekes knowledge and consent.

[20] Mr. Mills' evidence is that he met several times on site between 13th October 2013 and 29th April 2015 during which time Mr. Weekes expressed his approval of the works. All of the works were completed in accordance with the agreement with Mr. Weekes and any variations from the original design were accepted by Mr. Weekes. Mr. Mills says email correspondence between them never expressed any dissatisfaction or disapproval or reservations with respect to the barrier. The Court is not privy to those emails referred to except that of 31st May 2013 referred to earlier. In fact, he says he and Mr. Liebmann were invited to the Weekes' annual Christmas parties between 2013 and 2015 and no mention was ever made about any dissatisfaction with the barrier. To the contrary, Mr. Weekes complimented him on the speed and quality of the work being done.

[21] Mr. Mills says it was only about 28th December 2015 that Mr. Weekes refused any further co-operation and refused further access to the Property in order to allow them to complete the remainder of the barrier. In cross-examination, he says it was at that point he realised that he no longer could get access to the gate to the Property. Mr. Mills says he was quite surprised at Mr. Weekes' request to remove the barrier in its entirety and to return the land to its original state in light of the existing agreement and in light of the considerable sums which had already been expended on the construction.

[22] Mr. Mills says it is untrue to state that they entered Mr. Weekes' property without consent and took possession of it as at all times Mr. Weekes was aware, agreed to, and allowed us to access his property. Mr. Mills says further that they acted to their own detriment in furtherance of the agreement with Mr; Weekes and it would be unfair to now demand that they remove the barrier, restore the land and compensate Mr. Weekes for trespass when no trespass in fact occurred.

Pleadings

[23] Before going into my analysis I wish to digress a little to consider the matter of the pleadings which I think is very important. The claimant's pre-trial memoranda embarked on areas which had not been foreshadowed in the claimant's statement of claim or witness statement. The claimant's case from

the start is that the defendants entered his property without his consent and took part possession of it and erected a wall. His evidence in chief suggested that the defendants approached him for permission to erect a fence on his property but he does not go on to say that he gave any such permission. The claimant's case has now morphed into he gave permission to the defendants to erect a fence and instead they erected a wall and he never agreed to that.

[24] Counsel for the claimant, Mr. Thaddeus Antoine ("Mr. Antoine") suggested to the Court that there was no material difference in the two positions and that it was a matter of semantics. He also suggested that Mr. Weekes' witness statement expanded on what was already in the statement of claim.

[25] Counsel for the defendants, Mr. Duane Jean Baptiste ("Mr. Jean Baptiste") on their other hand, contended that the claimant cannot rely on facts which were not included in his statement of claim. It is their submission that the claimant's pleadings made no mention of the defendants exceeding the permission which had been granted.

[26] It has been made abundantly clear that pleadings are important. There is a significant difference between saying that one did not consent for someone to enter onto their property and build a fence/wall and saying that one did consent for them to enter but what they did was not in keeping with what had been agreed to. It is clear that in Mr. Weekes' evidence in cross-examination he was trying to suggest that he did not give permission to build a wall such as that which the defendants constructed. However, his case is that the defendants entered his property without his consent and built a wall, in essence they entered his land without his permission. I respectfully disagree with Mr. Antoine's suggestion that it is matter of semantics as the defendants would have answered the claim as alleged by the claimant. Witness statements are to provide the details of the allegations made in the pleadings and the Court cannot simply consider that a new allegation has arisen and adjudicate on it when that was not foreshadowed in the statement of claim or in a reply to the defence filed.

[27] I will start with the case of **Shankiel Myland v The Commissioner of Police**¹ which I have often quoted where Ellis J said:

“The Court cannot accept that in these circumstances it is appropriate for a claimant to ignore the requirements set out under the CPR and to seek to litigate an issue which has not been raised in his pleadings, thus taking the opposite party completely by surprise.”²

...
“Litigation proceeds on the basis that the court is a court of pleadings. They are critical in that they give fair notice of the case that has to be met, so that the opposing party may direct its evidence to the issues disclosed and they assist the court in adjudicating on the allegations made by the litigants.”³ (my emphasis)

[28] Lord Woolf MR in **McPhilemy v Times Newspapers Ltd**⁴ was clear that pleadings are still required to mark out the parameters of the case that is being advanced by each party. **In particular, they are still critical to identify the issues and the extent of the dispute between parties.** What is important is that the pleadings should make clear the general nature of the case of the pleader.⁵

[29] CPR 8.7(1) states that the claimant must include in the claim form or in the statement of claim a statement of all the facts on which the claimant relies. The claimant failed to comply with this rule.

[30] Mr. Antoine also referred to the case of **East Caribbean Flour Mills Limited v Ormiston Ken Boyea**⁶ to support his contention that the witness statement of Mr. Weekes simply provides the details of the allegations of trespass made. However, a close reading of the case will show that the Court was very clear that the pleadings must at least raise the allegations and then the witness statements give further details. It was also the case that what the court was seeking to ascertain in that case was whether the pleadings had sufficiently

¹ GDAHCV2012/0045, delivered 9th May 2014, (unreported).

² At paragraph 37.

³ At paragraph 41.

⁴ [1993] 3 All ER 775.

⁵ See also *East Caribbean Flour Mills Limited v Ormiston Ken Boyea*, SVGHCVAP2006/0012, delivered 16th July 2007.

⁶ SVGHCVAP2006/0012, delivered 16th July 2007, unreported.

raised a particular cause of action. In this case the pleadings raised a specific allegation of trespass and provided the basis of the allegation. The allegation cannot now completely change.

[31] In the recent case of **Mathilda Nelson v Alexis Alcide**⁷ the Court of Appeal addressed the issue of pleadings and had this to say:

“The modern practice of pleadings in civil cases, which is the bedrock of pleading under the CPR 2000, is that **the statement of case must contain all the facts upon which a party intends to rely in support of their claim or defence**. The fundamental principle is that **it must be sufficiently clear to the other party what are the matters in dispute between them, and what are the salient facts and important documents upon which a party intends to rely in support of their claim or in their defence**. In ascertaining whether a party has satisfied the requirements under the CPR for setting out their statement of case, a court, consistent with the modern practice, will look, not just to the statements of case itself, but also to the witness statements and other key documents in the case, all of which help to define the dispute and the underlying legal and factual issue between the parties.” (my emphasis)

Analysis and Conclusion

[32] Mr. Weekes’ evidence is that the defendants have entered his property without his consent and constructed a wall fence and further they have encroached some 27.5 feet into his property from the boundary line. No evidence was produced to support the allegation of the encroachment. There was no report from a surveyor to assist the Court. Mr. Antoine suggested that the Court could visit the locus and would be able to see the encroachment. However, encroachment and the area of such encroachment is not a matter of simply viewing but requires some technical skill. That evidence was not before the Court. Mr. Antoine’s further suggestion that the Court must accept the claimant’s evidence of the encroachment because it was uncontroverted cannot be accepted as it is the claimant’s allegation that there has been encroachment and it is therefore for him to prove. The defendants for their part have denied this allegation.

⁷ SLUHCVP2018/0002, delivered 8th April 2020, unreported at paragraph 30.

[33] As indicated earlier, Mr. Weekes in his evidence quoted sections of the email trail of 31st May 2013 which I must add was not exhibited to his witness statement although he had disclosed same in his list of documents. LW1 attached to the witness statement was one of the pictures included in the email of 13th May 2013. The email of 13th May 2013 from Mr. Mills was sent at 11:25 a.m. I set out below the substantive and relevant portions of the email trail minus the photos which are included in the email. The underlined italicised portions of the email are all that was contained in Mr. Weekes' witness statement.

"But let us not forget that the reason that the reason we chose to live on Trouya Pointe is because of its outstanding natural beauty. And any fence we erect there needs to not only protect the people we love but also our precious views!"

The 3-D Model

I have gone to some length to create a digital 3D model using CAD. I the used my model to study in detail numerous scenarios with the aim of assessing the impact of the proposed fence on our sight lines. I played extensively with variations of height, colour, styles and materials, longevity and maintenance. And the result [of] that exercise is represented in the drawings below and specification herein.

Quite simply: *what I propose to you is the best possible security solution with the least negative aesthetic impact.*

Win-Win Solution

As I mentioned during our chat, our initial thought was to simply erect a fence around the entire perimeter of Morne Trulah. But, we understand that doing that might possibly disturb your enjoyment of your property and potentially harm our relationship as neighbours. You could say that the area is better left open, and I would feel the same way if I were in your position 'on the other side of the fence.'

So, we shall consider not erecting a substantial continuous fence along the boundary lines between the properties. We believe it possible to let serve as natural border the cliffs on two sides of our property. However, to take this course of action requires cooperation on your part. Specifically, we would need your express agreement to allow us to permanently install two (2) short L-shaped fences at the two locations indicated in the diagram below (see purple L's).

We further propose that we bear the full cost of these L-shaped fences, and--following installation by ourselves--that they become your property. We would also provide all ongoing maintenance of these same fences.

[photo of proposed location of L-shaped fences]

Note that the locations are the same as those at which you have already installed chain link fences.

The fence will include:

- rigid, welded mesh panels measuring 2m high x 2.4m high
- each panel and post will
 - be made in the UK;
 - be triple dip galvanised in aluminium-zinc;
 - powder-coated with black PPA – an ultraviolet-impenetrable and water-impermeable resin coating (not PVC –poly vinyl chloride –which fades and flakes and peels after a few years);
 - be fixed by stainless steel nuts and bolts;
 - set onto a poured concrete foundation measuring 0.5m wide (0.25m each side) and as deep as 0.5m at the postholes.
- each electrified wire will:
 - be made from low-carbon steel and rust-proof aluminium alloy;
 - be designed to withstand harsh, salty, corrosive marine environments;
 - be set in conjunction with all the electrified wire to form a very high tension of 2.5 tons;
 - not sag
- The fence is designed to:
 - NOT block the views;
 - be cut-resistant;
 - ultra durable;
 - NOT rust or discolour;
 - require **no** maintenance over its designed lifetime of 100 years

(5 photos follow depicting the fence)

Next steps:

Would you please either accept or decline our offer as a matter of urgency. I intend on placing the order on Monday by mid-day. Thanks I can be reached onshould you wish to discuss.
I look forward to your reply.

Best regards
Michael and Brad”

[34] On the same 31st May 2013 at 23:20 p.m., Mr. Weekes replied to the email in the following terms:

“Hey Michael looks great. Better than my current set up. So it’s ok with us ... [Go] ahead you have our permission.
All the best.
Lincoln and Esther”

[35] The tenor of Mr. Weekes evidence continued to support his allegation in the statement of claim. He does not say in his witness statement that he ever gave the permission which was being sought by Mr. Mills. In fact, it is only in cross-examination that any evidence of permission being given by Mr. Weekes surfaced. Counsel for the defendants, Mr. Jean Baptiste suggested to Mr. Weekes that he did in fact give permission to the defendants to enter his property to which Mr. Weekes responded 'Yes'. I find this significant as it reflects a lack of candour in the claimant's evidence which only weakens the credibility of the claimant's evidence.

[36] Mr. Weekes disagreed in cross-examination that his statement in his statement of claim that the defendants entered his property without his consent and built a wall fence was inconsistent with his response to Mr. Mills' email of 13th May 2013 where he had given permission.

Trespass

[37] Trespass refers to the unlawful presence on land in the possession of another. A defendant may prove that at the time of the alleged trespass he was acting under the authority of the person in possession of the land.

[38] Mr. Antoine submits that even if Mr. Weekes had granted permission, the moment he demanded that the wall be removed from his property, and the defendants did not do so, they would be deemed to be trespassers. He says that even if permission was given, that permission was revoked when the defendants failed to construct the wall as agreed. He also submits that when the claimant gave notice to the defendant to remove the wall, that amounted to revocation of the permission. But I remind that that is not the claimant's pleaded case.

[39] When one looks at all the evidence, Mr. Weekes clearly gave permission to the defendants to enter his property to construct a fence of some sort and therefore in that regard his claim must fail as there can be no trespass if that is the case. In addition, Mr. Weekes has produced no evidence of any encroachment onto

his property, no survey plan or evidence from any expert. Therefore, his claim for possession and trespass must fail.

- [40] Mr. Antoine suggests that notwithstanding the lack of a specific allegation in the statement of claim, the Court can consider whether the construction of the wall was outside of the scope of the permission given? As I have concluded above, the claimant's pleaded case is not that he granted permission for construction of a fence and a wall was built, it is that the defendants entered his property without his consent and took possession of a part of it and have built a wall. There is no hint in this allegation that permission was ever given to enter the claimant's property to build one thing, but the defendants entered and built something different. Such an allegation would engage very different considerations. It would therefore be prejudicial to the defendants to consider a matter which was not pleaded and which they did not specifically answer.

Conclusion

- [41] Based on the foregoing, Mr. Weekes' claim for possession and trespass must fail. There is no need to go on to consider the issue of estoppel raised by the defendants as that does not arise in the context of the claimant's pleaded case and the Court's findings. Mr. Weekes' claim was never that though he had granted permission, he is now revoking that permission and therefore the defendants' continued presence on his property constitutes trespass. Were that the case the issue of estoppel would have been arisen for consideration.
- [42] Suffice it to say, that I consider that must be unconscionable for the claimant to bring this claim six (6) years after the start of the construction on his property and four (4) years after the wall had been substantially built.
- [43] The Court has been and is still of the view that this claim is better resolved if the parties as grown adults put aside their obvious emotions and take a practical approach to the matter. I would urge the parties to dialogue and find a way to bring resolution to this matter in circumstances where only they know the whole truth as I know they have attempted to do.

Order

[44] The claim is dismissed with costs to the defendants jointly in accordance with CPR 65.5(2)(b) in the sum of \$7,500.00 calculated on the value of the claim as \$50,000.00.

**Kimberly Cenac-Phulgence
High Court Judge**

By The Court

Registrar